91-364

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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL E. ARNOLD,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a machinist employed by an interstate rail carrier and who is injured while performing the function of repairing the brakes of a locomotive engine situated within the confines of a dock facility, but a significant distance from the water's edge, is limited to recovery under the Longshoreman and Harbor Workers' Compensation Act or whether he may maintain an action for personal injury pursuant to the Federal Employers Liability Act.

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OPINIONS BELOW

The opinion of the district court, dated September 7, 1990, is not officially reported, and appears as Appendix A to this Petition.

The opinion of the Court of Appeals, dated June 6, 1991, is not officially reported and appears as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Petitioner, Paul E. Arnold, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on June 6, 1991.

This action was commenced with the filing of a complaint for personal injuries pursuant to the provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. Sec. 51 *et seq.* and specifically Section 56 thereof, establishing jurisdiction in the United States district courts for actions brought under the FELA.

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit from a judgment of the United States District Court for the Northern District of Ohio dismissing the complaint, with prejudice, for lack of subject matter jurisdiction.

On June 6, 1991, the Sixth Circuit Court of Appeals, in a brief per cuiram decision, affirmed the judgment of the District Court.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

45 U.S.C. Section 51:

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees or such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and an Act entitled "An Act relating to the liability of common carriers by railroad to thier employees in certain cases" (approved April 22, 1908) (45 USCS Statute 51 et seq.) as the same has been or may hereafter be amended.

33 U.S.C. Section 902(3):

. . . the term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, shipbuilder and shipbreaker . . .

33 U.S.C. Section 903(a):

. . . except as otherwise provided in this section, compensation shall be payable under this act in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

STATEMENT OF THE CASE

This is an action brought under the Federal Employers' Liability Act (PELA) for personal injuries sustained by the Plaintiff, Paul E. Arnold, on April 21, 1988. On that date, Plaintiff was employed by Defendant, Consolidated Rail Corporation, as a mechanic/machinist and had been so employed since approximately March 31, 1970. At his deposition, Plaintiff testified that he normally worked out of the Defendant's Stanley Yard (a railroad facility located in the vicinity of Toledo, Ohio), reporting every day at the fuel pad. For the summer season of 1988, he was the sole regularly scheduled Conrail mechanic assigned to the Presque Isle/Lakefront Dock facility. Prior to the 1988 season, he never worked at Presque Isle on a regular basis, but occasionally was sent there to service a particular train.

Mr. Arnold's basic job duties as a mechanic for Conrail at the dock facility were described as follows:

> A. Checking out the locomotives, going from the cab of the engine, 20 engine, checking out, make sure the engine's working proper, make sure there's no leakage for the air when the unit is tied onto the train, taking a leakage test, get down, make sure all sanders are working.
>
> Q. What are sanders?
>
> A. That is sand that goes on every wheel on the track.
>
> Q. Okay. Go ahead. I know what you mean.
>
> A. Check out the sanders, make sure they're all working. Check out all brake rigging, all the brake shoes, the brake travel, checking out traction motors. Just visual looking to see if we could see anything wrong and making repairs for anything we find wrong. It's mechanical.
>
> Q. So not only have to check out the locomotive, if you find something wrong it's your duty to repair it.
>
> A. Yes, sir.

(Deposition of Paul Arnold at 87).

On the morning of his injury, Mr. Arnold proceeded to inspect TORCO Engine No. 7800 in the same manner as he had inspected ten other railroad engines that same morning. This locomotive power unit was a full size engine similar to those operated by both Conrail and Chessie System both within the Lakefront Dock facility and over the road. Plaintiff checked the air equipment, automatic brake, independent brake, deadman pedal, cab sink shell, windshield wipers, the boiler, governor, headlights and brakes. When he examined the brake on wheel number three, he found the brake shoe to be defective. It was while attempting to replace this brake shoe on Engine No. 7800, which Plaintiff referred to as being so badly in need of repair as to constitute a "federal defect," that Plaintiff sustained the herniated lumbar disc for which suit under the FELA was instituted.

In addition to the Plaintiff's deposition, the facutal record before the district court consisted of the Affidavit of James A. Arton, Assistant Manager of the dock facility, which was filed by Defendant in support of its Motion to Dismiss; the deposition of Mr. Arton taken by Plaintiff; and the Affidavit of Terry D. Lewis, a private investigator and photographer retained by Plaintiff. At his deposition, Mr. Arton testified that he had no independent recollection of Plaintiff's injury, having learned of it only through a Conrail claims agent. Arton understood, and it is not disputed, that the injury occurred at a location with which he was familiar and which he approximated to be at least 2000 yards from the water. Further, Arton admitted that the activity of changing brake shoes on a locomotive (power unit engine) was a traditional railroad activity.

During the course of this deposition, Mr. Arton was shown photographs of several types of locomotives found at the docks. All of these photographs had been taken by Terry D. Lewis, Plaintiff's photographer. Exhibits 2 and 3 of the Arton deposition depicted the TORCO unit upon which Plaintiff was injured. Exhibit 4 depicted a CSX road locomotive similar in size and functions as Locomotive No. 7800 and

which was found within the Lakefront Dock facility. Exhibit 5 depicted a much smaller "pusher unit" used to index cars into a dumper. Pusher units are much smaller both in regard to size and power from the TORCO unit being serviced by Plaintiff when he was injured.

According to Aton, all of the activity relative to the operation of the small pusher unit took place in close proximity to the water. Further, the servicing and repair of these pusher units was done by members of the Longshoreman's Association, a different labor union from which Plaintiff was a member. When asked who would repair the TORCO unit, the response was "locomotive mechanic." Thus, while it was theoretically possible for a longshoreman to repair a larger TORCO unit located 2000 yards (or more) from the water, it would be a violation of the longshoreman union contract to do so. In other words, as a practical matter, a longshoreman could *not* have done the repair work on TORCO 7800 which was being performed by the Plaintiff. Further, Arton testified that the TORCO unit being repaired by Plaintiff was located in an area customarily used for the repair of railroad equipment. This area and sidetrack was located approximately *two miles from the water,* was on a *sidetrack situated four tracks south of any rail movement and was not being used for the loading or unloading of coal.*

In paragraph 3 of the affidavit of James Arton, which was filed by Defendant in support of its motion to dismiss, Arton stated generically that the work being done by Plaintiff was "an integral part of the loading and unloading process." However, when he was cross examined and asked to elaborate on this statement at deposition, Mr. Arton *recanted* his prior Affidavit averment and testified as follows:

> Q: What I am getting at, the fact that this locomotive, this TORCO 78 [sic] was down for repair did not shut down the loading and unloading process at the dock, did it?
>
> A: No.

Q: I want to assume that, in fact, on the day of this injury there was a problem with the brake shoe and because of that Mr. Arnold believed that it may have created a federal defect. You know that that means, don't you?

A: Yes, I do.

Q: Okay. What does that mean?

Mr. Timonere: Talking about the federal defect now?

Mr. McGill: Yes.

A: It means that the problem with the locomotive would have made the locomotive illegally used under the Federal Railway Administration Act until the problem was corrected.

Q: Now, once that situation occurs that power unit has to be repaired, correct?

A: In the case of brake shoes that needs to be anticipated, and the brake shoes could be replaced at a time of convenience to the railroad rather than wait until was not suitable for service.

Q: Are you telling me that on this day this brake shoe was being repaired at a time convenient to the railroad?

A: I don't recall on that particular day, but that would be the normal procedure.

Q: And when you say "at a time convenient to the railroad," what are you talking about?

A: It would be at a time when there is no ore to load into cars and machinery is idle and the locomotive is available for such maintenance work.

Q: In other words, the loading and unloading process at the dock would not be materially affected by the power unit being out of service?

A: That would be good management.

Q: That would be a true statement also, wouldn't it?

A: Yes.

Based upon all of the foregoing, Plaintiff contended that the District Court had subject matter jurisdiction over his claim for personal injuries under the FELA and that Defendant's proposition that recovery could only be had under the Longshoreman and Harborworker's Act should have been rejected. The trial court held, however, that it lacked jurisdiction and dismissed the complaint. The Sixth Circuit Court of Appeals affirmed this determination.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

A. Introduction

The issue posed by the Railroad's motion to dismiss for lack of subject matter jurisdiction and upon this appeal is whether the Plaintiff's injuries are covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. Sec. 51 *et seq.*, as alleged in the complaint, or whether his exclusive remedy is under the Longshoreman and Harborworker's Compensation Act. (LHWCA), 33 U.S.C. Sec. 901 *et seq.*, as argued by Conrail.

The FELA was enacted approximately 80 years ago in order "to put on the railroad industry some of the cost for legs, eyes, arms and lives which it consumes in its operations." *Wilkerson* v. *McCarthy*, 366 U.S. 53, 66 (1949). It has been consistently held that the FELA is remedial in nature and is to be liberally construed to effect its humanitarian purposes. *See, e.g., Green* v. *River T.R. Co.*, 763 F.2d 805 (6th Cir. 1985); *Bocook* v. *Louisville & N.R. Co.*, 67 F.Supp. 154 (D.Ky. 1946). *Accord Rodriguez* v. *Delray Connecting Railroad*, 473 F.2d 819 (6th Cir. 1973).

Historically, the LHWCA covered only employees injured upon navigable waters. *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). In response to that decision, the Act was amended in 1972 to provide a two pronged test for coverage, situs and status. The situs requirement is set forth in 33 U.S.C. Sec. 903(a):

> . . . except as otherwise provided in this section, compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

Section 902(3) of the Act defines the status requirement:

> . . . the term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, shipbuilding and shipbreaker . . .

Both the trial court and, inferentially, the Court of Appeals in the case *sub judice* found this Court's holding in *Chesapeake & Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S.Ct. 381 (1989), to be controlling. Appellant submits, however, that the decisions below go far beyond the "consciously narrow holding" of the *Schwalb* decision. *See Merrill* v. *Chicago & Illinois Midland Ry. Co.*, 715 F.Supp. 770 (C.D. Ill. 1990). Railroad employees such as Paul Arnold, who are the subjects of Congressional protection by virtue of the passage of the FELA, should not be relegated to a lesser degree of damages under the LHWCA based upon his varied work assignments within a given day and the shifting and uncertain vagaries of "situs" and "status." Railroad workers should have the right to expect the protection and benefits of the FELA, an act of Congress which has protected them since its enactment in 1906. Preventing the application of the FELA to the case at bar would only serve to extend Congress' imaginary boundary line of the LHWCA to an unreasonable and unprecedented point which is devoid of logic or practical function.

The instant case affords this court the unique opportunity to define and/or refine the status and situs requirements of the LHWCA. The decisions below mandate that recovery for any injury to an interstate railroad employee will be limited to LHWCA if it occurs anywhere within the vast and undefined ares contained within a dock facility and regardless of the nexus between the work being performed at the time of the injury and longshoring activities.

B. The Injuries Sustained by Petitioner Occurred Outside of the Parameters of the Situs Test Enunciated in 33 U.S.C. Sec. 903(a).

While it is true that Congress intended, within a limited respect, to provide LHWCA coverage to landbased employees, it does not follow that it intended that every inch of area within the geographical limits of a dock or port facility be considered "adjoining" as used in Sec. 903(a). As noted by this Court in *Director, Office of Workers' Compensation Programs* v. *Perini*, 459 U.S. 297, 317 (1983), the legislative history of the 1972 amendments to the LHWCA reveals that Congress did not "intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

The issue of situs was not before this Court in *Schwalb*, *supra*. However, in the post-*Schwalb* case of *Merrill* v. *Chicago & Illinois Midland Ry. Co*, *supra*, it was observed that situs under Section 903(a) "is tied directly to whether the location [of this accident] is 'customarily used . . . in loading . . . a vessel.' " 751 F.Supp. at 771. Put differently, "is the situs used as part of loading or unloading operations?" *Id.*

In the case *sub judice* the accident occurred on a remote *sidetrack* located approximately 2000 yards from the water, where the loading and unloading process could not be affected by these repair efforts. As Judge Mills observed in *Merrill*, "there is a line somewhere . . . where the situs test would no longer be met, and where no maritime jurisdiction would be present." 751 F.Supp. at 778. Only this Court can draw that line. It is inconceivable and illogical that Congress could have intended the LHWCA to apply to an injury occurring where and under the circumstances found here.

This Court should, therefore, accept this case so as to define the outer limits of situs under 33 U.S.C. Sec. 903(a). This Court should also accept this case to determine whether tracks running into, out of and through a dock facility con-

stitutes a "marine railway" as that phrase is used in Sec. 903(a). Both of the lower courts in this case concluded that Paul Arnold was injured on a marine railway. Appellant submits that this is patently incorrect. Case law has defined a "marine railway" in much different terms. Thus, in *O'Leary* v. *Puget Sound Bridge and Dry Dock Co.*, 349 F.2d 571, 573 (9th Cir. 1965), the Court construed the words "marine railway," as defined by the United States Department of the Navy, as follows:

> A marine railway is a permanently fixed track system extending from a point on shore well above the waterline to a point offshore well below the waterline; it is equipped with a cradle capable of moving along the track by means of rollers or wheels, and a cable or chain and hauling mechanism for hauling the cradle carrying the docked ship into or out of the water. A vertical lift is a variation of a marine railway that is used for small craft; it consists of a cradle and lifting device for raising the craft vertically out of the water.

See also, St. Louis Shipbuilding Co. v. *Director of Office of Workers' Compensation Programs*, 551 F.2d 1119 (8th Cir. 1977) (applying 1972 amendments). Patently, the Plaintiff in the instant case was *not* injured on a marine railway as defined by the Ninth and Eighth Circuit Courts of Appeal, and the courts below erred in concluding otherwise.

C. Petitioner is not an "Employee" within the Meaning of 33 U.S.C. Sec. 902(3).

The focus of the status test set forth in 33 U.S.C. Sec. 902(3) is occupational. As this court stated in *Schwalb*, *supra*: "[L]andbased activity occurring within the Section 903 situs will be deemed maritime only if it is an essential part of loading or unloading a vessel." 110 S.Ct. at 384. Thus, "employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Id.* at 385.

The question which it is respectfully requested this Court must address is what is "essential equipment?" Is one of ten locomotives available to haul coal cars so essential to the loading and unloading process that an injury sustained while repairing its brakes relegates the railroad employee to harbor workers' benefits as opposed to tort recovery under the FELA? In *Schwalb*, this Court indicated that "[t]he determinative consideration is that the ship loading process could not continue unless the retarder . . . was operating properly." 110 S.Ct. at 836. There was also evidence that conveyor belts would "eventually" become clogged if not periodically cleaned. *Id.*

However, in the case at hand, there is not *one scintilla* of evidence that the loading or unloading process would in any way be impeded by the temporary removal from service of this one locomotive upon which plaintiff was working when he sustained his injury. To the contrary, the testimony of James Arton, the Assistant Manager of the dock facility, points totally in the other direction:

> Q: Are you telling me that on this day this brake shoe was being repaired at a time convenient to the railroad?
>
> A: I don't recall on that particular day, but that would be the normal procedure.
>
> Q: And when you say "at a time convenient to the railroad," what are you talking about?

A: It would be at a time when there is no ore to load into cars and machinery is idle and the locomotive is available for such maintenance work.

Q: In other words, *the loading and unloading process at the dock would not be materially affected by that power unit being out of service?*

A: That would be good management.

Q: That would be a true statement also, wouldn't it?

A: *Yes.*

(Deposition of James Arton at 34-35).

It was, therefore, totally uncontradicted on the record below that Mr. Arnold's mechanical activities *vis a vis* the defective locomotive was *not* essential to the loading or unloading process. Further, just as the rerailment in *Merrill* was not longshoring but rather railroad activity, 751 F.Supp. at 779, the act of repairing a broken and defective brake shoe in the instant case must be considered a railroad activity.

Given the "consciously narrow holding" of this Court in *Schwalb, see Merrill, supra,* at 778, it is repsectfully submitted that *Schwalb* must be confined to its facts. Railroad employees such as Paul Arnold, who are the subjects of Congressional protection by virtue of the passage of the FELA should not be relegated to a lesser degree of damages under the LHWCA based upon the shifting and uncertain vagaries of situs and status. Railroad workers should have the right to expect the protection and benefits of the FELA, an act of Congress which has protected them since its enactment in 1906. Preventing the application of the FELA to the case at bar would only serve to extend Congress' imaginary boundary line of the LHWCA to an unreasonable and unprecedented point which is devoid of logic or practical function.

While there may be an occasional case where the Longshore and Harbor Worker's Compensation Act will prevail over the Federal Employer Liability Act, these cases

should be the strictly limited exception rather than rule. Paul Arnold was a Railroad employee performing traditional Railroad services on a railroad engine which was far removed from and not an integral part of the loading and unloading process. In fact, the evidence of record herein clearly suggests that this traditional railroad job was assigned to Plaintiff at a time and place in which the loading and unloading process could not be affected. Certainly, the case at bar is not a case where the LHWCA should be held to apply. This Court has the unique opportunity to provide direction to and chart a clear path for injured railroad workers by defining the application of the LHWCA vis a vis the FELA. Thousands of federally protected railroad employees will be affected by the Court's attention to this issue.

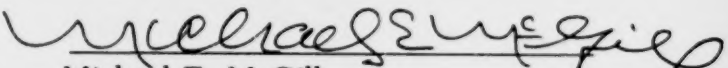
Accordingly, petitioner respectfully prays that the Court grant this Petition for Certiorari.

CONCLUSION

For the reasons stated above, the decision of the court of Appeals in the instant case raises a question of general importance in the administration of both the Federal Employers Liability Act and the Longshore and Harbor Worker's Compensation Act. It is critical that this Court further define the parameters of LHWCA coverage so that interstate railroad employees who receive on-the-job injuries may recover damages for those injuries under the FELA, as intended by the Congress of the United States.

WHEREFORE, petitioner respectfully prays that the petition for certiorari be granted.

Respectfully Submitted,



Michael E. McGill
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case NO. 3:89CV7318

PAUL E. ARNOLD,

Plaintiff(s),

vs.

CONSOLIDATED RAIL CORP.,

Defendant(s).

OPINION AND ORDER
(Filed September 7, 1990)

WALINSKI, J.

This cause is before the Court on Defendant's motion to dismiss, plaintiff's opposition thereto and defendant's reply. This Court has jurisdiction pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* (FELA).

Background

In deciding a motion to dismiss under Rule 12(b) Fed. R. Civ. P., the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon* v. *King & Spalding*, 467 U.S. 69 (1975), while viewing the complaint in a light most favorable to the plaintiffs. *Schuer* v. *Rhodes*, 416 U.S. 232 (1974); *Westlake* v. *Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be

demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Westlake*, *supra*, at 859. *See generally* 2A J. Moore, W. Taggert & J. Wicker, *Federal Practice*, ¶ 12.08 (2d ed. 1985).

Plaintiff, Paul E. Arnold (Arnold), was a mechanic employed by defendant Consolidated Rail Corp. (Conrail) at the Presque Isle/Lakefront Docks facility (the dock facility) in 1988. He allegedly injured his back trying to release a brake shoe from the brake assembly of a locomotive. The locomotive, No. 7800, was owned by Toledo Ore Railroad Company (TORCO), a wholly owned subsidiary of CSX Transportation Inc. (CSX). Locomotive No. 7800 was used to move rail cars into and out of the "loadout" station located within the dock facility. Arnold's alleged injury occurred on a section of track located approximately 2,000 yards away from the waterfront but within the dock facility.

Conrail moves the Court to dismiss this action for lack of subject matter jurisdiction, claiming that because Arnold was a maritime employee, his exclusive remedy lies under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA). Arnold argues that he was not a maritime employee, as that term is defined by the LHWCA, and that this Court has jurisdiction to hear his FELA claims.

Discussion

If Arnold is covered by the LHWCA, that is his sole and exclusive remedy and his FELA claims are preempted and must be dismissed. 33 U.S.C. 905(a); *Kelly* v. *Pittsburgh & Conneaut Dock Co.*, 900 F.2d 89 (6th Cir. 1990). The Supreme Court, in *Chesapeake and Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S. Ct. 381 (1989), identified four elements that must be met for LHWCA coverage to apply:

> the injured person must be injured in the course of his employment, 33 U.S.C. § 902(2); his employer must

> have employees who are employed in maritime employment, § 902(4); the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," 903; and the employee who is injured within that area must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker . . . 902(3).

Id. at 384. These last two elements are known as the "situs" and "status" requirements, respectively. They should be interpreted broadly with a view towards extended coverage of the LHWCA. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977).

In the case *sub judice*, the first two elements are undisputed: Arnold was allegedly injured in the course of his employment attempting to repair Locomotive No. 7800 and Conrail has employees employed in maritime employment, pursuant to the Toledo Docks Operating Agreement. However, the parties disagree as to the situs and status requirements.

The situs requirement is a functional one: is the situs used as part of the loading or unloading operations? *Merrill* v. *Chicago & Illinois Midland Ry.*, ____ F. Supp. ____, WL 118064 (C.D. Ill. 1990). Arnold argues that because his injury occurred on a section of track located approximately 2,000 yards from the waterfront, the situs requirement is not met. However, distance from the water itself is not determinative of coverage. *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080, 1082-84 (4th Cir. 1975), *vacated on other grounds*, 433 U.S. 904, *on remand*, 563 F.2d 646 (1977) (workers injured in marshaling area ____ feet to three quarters of a mile from the water met the situs requirement);

Conligio v. *Norfolk and Western Ry.*, 670 F. Supp. 1353, 1354-55 (E.D. Mich. 1987) (railway's "eastbound yard" satisifed the situs requirement). Arnold's injury occurred on tracks used to move coal cars around inside the dock facility. It is clear that they were part of a marine railway, which by express definition is considered to be a part of the navigable waters of the United States. 33 U.S.C. 903(a). Given the *Caputo* mandate that coverage be interpreted broadly, this Court finds that Arnold satisifes the situs requirement.

The status requirement is an occupational one: was the employee involved in an occupation essential or integral to the loading or unloading process? *Chesapeake and Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S. Ct. 381, 385 (1989). In *Schwalb*, the Supreme Court held that two maintenance workers were covered under the LHWCA for injuries incurred while cleaning conveyor belts used to load coal onto ships. This maintenance was essential to the loading process because if it was not performed, the loading process would eventually be shut down. *Id.* at 386.

Schwalb was recently interpreted in *Atlantic Container Service, Inc.* v. *Coleman*, 904 F.2d 611 (11th Cir. 1990). In that case, Coleman, a mechanic, was injured while making repairs to outbound chassis. These chassis were used to carry containers unloaded from ships to various points inland. The court, in finding coverage under the LHWCA, held that "[w]ithout the essential maintenance necessary to make the outbound rigs roadworthy, the unloading process would stop indefinitely." *Id.* at 618.

In the case *sub judice*, Arnold contends that he was merely performing traditional railroad work. This makes no difference. *Schwalb* at 386. Locomotive No. 7800 and the others like it operated by TORCO are needed to move the cars into and out of the "load out station". Without his repairs, especially if the brake problem was a "federal defect" that would put No. 7800 out of service until fixed, the loading and unloading process at the dock facility would eventually come to a halt. Thus, Arnold's repairs were essential to the loading process and the status requirement is met.

Arnold meets all four elements of the *Schwalb* test for LHWCA coverage. Accordingly, it is

ORDERED that defendant's motion to dismiss be granted and that this case be dismissed for lack of subject matter jurisdiction.

/s/ NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
September 7, 1990

APPENDIX B

NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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90-3835

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL E. ARNOLD,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORP.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

(Filed June 6, 1991)

BEFORE: KEITH and MILBURN, Circuit Judges; and COHN, District Judge.*

PER CURIAM: Paul E. Arnold ("plaintiff") appeals from the district court's September 7, 1990, order granting defen-

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

dant Consolidated Rail Corporation's motion to dismiss for lack of subject matter jurisdiction.

Having carefully considered the record and the arguments presented in the briefs and orally, we find no error warranting reversal. We, therefore, AFFIRM the order of the Honorable Nicholas J. Walinski, Senior United States District Judge for the Northern District of Ohio, for the reasons set forth in his September 7, 1990, Opinion and Order. We note that even if the railroad tracks on which plaintiff worked were not a "marine railway," the finding that they were inside the dock facility area which adjoins navigable waters was sufficient to meet the situs requirement.

ISSUED AS MANDATE: June 28, 1991
COSTS: None

[DULY CERTIFIED]